85-983 (1)

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION; UNITED STATES OF AMERICA; DENVER & RIO GRANDE WESTERN RAILROAD COMPANY; MISSOURI-KANSAS-TEXAS RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; UNION PACIFIC RAILROAD COMPANY; and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Date: December 6, 1985

QUESTIONS PRESENTED

1. Does the Interstate Commerce Commission have the power under 49 U.S.C. § 11341(a) to relieve a railroad of its Railway Labor Act and contractual obligations to employees?

2. Do the immunity provisions of 49 U.S.C. § 11341(a) extend to all aspects of the means chosen by a railroad to operate after it has accomplished the financial transaction authorized under 49 U.S.C. § 11344?

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner United Transportation Union [hereinafter, "UTU"] respectfully cross-petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision of that Court, as amended, which remanded this proceeding to the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] for that agency to determine whether employees represented by petitioner and by another labor organization, the Brotherhood of Locomotive Engineers [hereinafter, "BLE"], should be denied all rights to participate in the process to select the forces to perform the trackage rights movements authorized by an order of the ICC.

OPINIONS BELOW

The opinion of the court of appeals issued May 3, 1985, as amended in July 1985, is reported at 761 F.2d 714 and is reproduced as Appendices A, C and D to the Petition of the ICC to this Court in Sup. Ct. No. 85-792. The two decisions by the ICC which were reviewed by the court of appeals are unpublished and are reproduced as Appendices F and G to the Petition of the ICC in Sup. Ct. No. 85-792.

JURISDICTION

The ICC and the Missouri-Kansas-Texas Railroad Company [hereinafter, "MKT"], two respondents herein, filed with this Court on November 7, 1985, separate and timely petitions for a writ of certiorari to review the decision of the court of appeals which this cross-petition also seeks to bring before this Court. That decision by the court of appeals was issued on May 3, 1985, and was amended on July 12 and July 19, 1985; timely petitions for rehearing by several respondents herein were denied on August 9, 1985.[1] Counsel for petitioner UTU was served with copies of the MKT petition (Sup. Ct. No. 85-793) on November 7, 1985, and with a copy of the ICC petition (Sup. Ct. No. 85-792) on November 12, 1985. This otherwise untimely cross-petition by the UTU is permitted by Rule 19.5 of the Rules of this Court, and invokes this Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTORY PROVISIONS INVOLVED

This cross-petition involves the proper interpretation to be given to Sections 11341(a) and 11347 of the Interstate Commerce Act, 49 U.S.C. §§ 11341(a) and 11347. Those statutory provisions have been reproduced for this Court as Appendix A to this Cross-Petition.

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[1] Neither petitioner UTU nor respondent BLE sought rehearing.

STATEMENT OF THE CASE

In October 1982, the ICC issued a massive decision which approved the applications of the Union Pacific Corporation to acquire and exercise control over the Missouri Pacific Corporation and over the Western Pacific Railroad Company. As the ICC explained in its decision: "Under the proposed transactions all of the involved existing railroads and holding companies will retain their separate corporate identities, but will be under the control of UPC and a new railroad holding company, Pacific Rail System, Inc. . . . ." *Union Pacific Corporation—Control,* 366 I.C.C. 459, 468 (1982), *aff'd in part, remanded in part sub nom. Southern Pacific Transportation Co. v. ICC,* 736 F.2d 708 (D.C.Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1171 (1985). In December 1982, the applicants exercised the authority which the ICC had given them and formed a single rail system which operates over 22,000 rail miles "connecting the Pacific Northwest, northern and southern California through the central corridor with the Midwest (including all major mid-continent east-west gateways), Mississippi River ports, Gulf Coast ports, and Texas-Mexico border crossing points." *Id.* at 474. That ICC approval, however, was not without limits, for the Commission imposed two forms of conditions—*i.e.,* trackage rights and employee protective provisions—which have resulted in this present controversy.

One form of condition attached to its approval of the control transactions was that the Missouri Pacific and Union Pacific railroads had to give the MKT and the Denver & Rio Grande Western Railroad [hereinafter, "D&RGW"] the right to operate over a substantial portion of their tracks to enter markets into which those competing carriers had not previously operated. MKT was to be given the right to operate over approximately 200 miles of Missouri Pacific tracks from the MKT's most northern point (Kansas City, Missouri) to both Omaha and Lincoln, Nebraska, and then into Council Bluffs, Iowa on the Union Pacific's tracks from Omaha. 366 I.C.C. at 570. D&RGW was to be granted the right to operate over 619 miles of Missouri Pacific tracks from Pueblo, Colorado to

Kansas City, Missouri. 366 I.C.C. at 572. According to the Commission (366 I.C.C. at 589):

> Approval of the proposed transactions [*i.e.*, control, *etc.*] is conditioned upon the granting of the various trackage rights discussed above. We impose these trackage rights conditions in order to preserve the competitive balance in transportation markets where competition might otherwise be significantly lessened as a result of the consolidations.

Since the MKT and D&RGW trackage rights conditions had been vigorously opposed by the Missouri Pacific and the Union Pacific railroads, neither MKT nor D&RGW had reached a trackage rights agreement with the applicants before the ICC issued its October 1982 decision. That fact, however, did not bar the Commission from granting MKT's and D&RGW's requests; as the ICC noted in its decision (366 I.C.C. at 589):

> No agreements have been reached between the parties regarding the trackage rights for which we have found a need. We prefer that the parties set the terms of their trackage rights agreement wherever possible, and then seek our approval as required, 49 U.S.C. 11343. In the event the parties should be unable to reach agreement, we will set the terms for the trackage rights.

Trackage rights were not the only form of condition imposed by the ICC on its approvals, for, as required by 49 U.S.C. § 11347, it provided in its order that the authority granted to the primary applicants, including the Missouri Pacific and Union Pacific railroads, "is subject to the conditions for the protection of employees enunciated in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 [*aff'd New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979)] . . . ." *Union Pac. Corp.—Control, supra*, 366 I.C.C. at 654, ¶ 17. Moreover, the Commission further ordered that (*Id.* at 654, ¶ 19):

> The trackage rights authority granted [to MKT and D&RGW, among others,] . . . are subject to the

> imposition of employee protective conditions to the extent specified in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 654 (1980) [*aff'd sub nom. Railway Labor Executives' Assoc. v. United States*, 675, F.2d 1248 (D.C.Cir. 1982)].

Although there is a difference between the two forms of employee protection, primiarily in the notice provisions (*see, Railway Labor Executives' Assoc v. United States, supra*, 675 F.2d at 1253), both sets of employee protection provide in Article 1, Section 2 that:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

See, 354 I.C.C. at 610. Moreover, Article 1, Section 4 of both sets of conditions provides that before the carriers may consummate a change in operations resulting from the ICC's actions which may impact on employees, the carriers must give advance notice to all "interested employees" and to their representatives. Also, that provision provides further that, if requested by rail labor, the carriers must negotiate an agreement to accomplish two purposes: (1) to apply the "terms and conditions" of the protections to the particular change in operations, and (2) to "provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case . . . ." 354 I.C.C. at 610, Art. 1, § 4.

On December 31, 1982, the Missouri Pacific sent a letter to various representatives of its employees, including petitioner UTU, informing rail labor that the MKT and D&RGW would commence trackage rights operations over the Missouri Pacific in the near future, with the MKT commencing its operations on

or about January 3, 1983. Petitioner UTU asked the Missouri Pacific to negotiate with it both over the impact of those trackage rights operations on Missouri Pacific employees and over the transfer to MKT of the right to operate on Missouri Pacific tracks. Missouri Pacific refused to negotiate on either subject because, in its opinion, the ICC's October 1982 decision required it to grant trackage rights to MKT and it therefore had no right to negotiate about either the selection of forces to staff MKT's operations over its tracks, or other aspects of the impact of that transfer of operating rights on Missouri Pacific employees represented by petitioner.

Respondent Missouri Pacific's position stemmed from its belief, which was echoed by MKT and D&RGW, that when the ICC granted MKT's and D&RGW's requests for trackage rights, it implicitly approved the proposals which those carriers had made concerning the staffing of their proposed trackage rights operations. MKT had stated in its trackage rights application that it would use its own employees to operate its trains over Missouri Pacific and Union Pacific lines (Joint Appendix in court of appeals [hereinafter, "J.A."] at 164), and the D&RGW had proposed that it "may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars" over the Missouri Pacific. J.A. at 165. Even though the ICC did not address those proposals in its October 1982 Decision, and even though the Commission conditioned its grant of trackage rights by imposing employee protective conditions which expressly required negotiations concerning crew selection procedures, the carriers persisted in taking the position that they had no obligation, either under the ICC's employee protective conditions or under the Railway Labor Act, to bargain with Missouri Pacific employees over the crew selection issue. According to respondent Missouri Pacific, "it would be inappropriate and unproductive" for it to bargain with petitioner because it had no ability "to bind" MKT or D&RGW "to an agreement regarding selection of forces." J.A. at 125-26. MKT went further and stated that not only did it have no obligation to bargain with Missouri Pacific employees, but it had bargained with its own employees and, thus, had

complied fully with whatever obligations it had to negotiate over the staffing of its trackage rights operations. J.A. at 129-31.

Respondent MKT commenced operations over the Missouri Pacific's and Union Pacific's lines on January 6, 1983 using its own employees. Respondent D&RGW also commenced operations over the Missouri Pacific lines but, unlike MKT, used and is still using Missouri Pacific employees to perform those operations. J.A. at 74-75; *see,* ICC Petition in No. 85-792 at 6a-7a.

After unsuccessfully requesting respondent Missouri Pacific to bargain with it over the trackage rights operations by MKT, petitioner UTU informed the Missouri Pacific that the employees represented by petitioner on the Missouri Pacific would withdraw their service at 12:01 a.m. on April 4, 1983. J.A. at 74. Respondent Missouri Pacific sought and obtained on March 30, 1983, a Temporary Restraining Order enjoining any strike by petitioner over this dispute. J.A. at 75. That interlocutory injunction was made permanent in 1984, and petitioner UTU has appealed from that permanent injunction to the United States Court of Appeals for the Eighth Circuit; that appeal was argued in January 1985 and is still pending. *Missouri Pacific R.R. v. UTU,* 8th Cir. No. 84-1465.

A. Proceedings Before ICC

In view of the carriers' insistance that the Commission's order had *sub silentio* resolved this issue, respondent BLE asked the ICC on April 4, 1983, to clarify its prior order and to inform the carriers that its October 1982 decision did not mandate the use of MKT or D&RGW crews, but rather left the crew selection issues to be resolved under the procedures of the Railway Labor Act, 45 U.S.C. § 151, *et seq.* J.A. at 4. On May 18, 1983, the ICC issued a decision denying the BLE's petition. Appendix to ICC Petition at 51a. According to the Commission, there was no need to clarify its prior order because: "We have broad authority to impose conditions on consolidations and our jurisdiction is plenary." *Id.* at 54a. As the ICC explained: "Inasmuch as DRGW and MKT proposed in their

applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations." *Id.*

Respondent BLE and petitioner UTU asked the ICC to reconsider its denial of the petition to clarify, asserting that the ICC did not have the authority to abrogate Railway Labor Act rights and that, even if it did, it had not done so in this case. *E.g.*, J.A. at 71. Those requests for reconsideration generated a fifteen (15) page decision by the ICC, served on October 25, 1983, in which the Commission asserted that 49 U.S.C. § 11347 did not limit its powers to abrogate Railway Labor Act obligations (Appendix to ICC Petition at 59a-60a) and that, since its immunity powers under 49 U.S.C. § 11341(a) were "self-executing," its decision automatically operated to relieve the carriers of "any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision." *Id.* at 67a-68a.

B. Court of Appeals Decision

In separate petitions for review which were consolidated, respondent BLE and petitioner UTU asked the United States Court of Appeals for the District of Columbia Circuit to review the ICC's refusal to clarify its order. On May 3, 1985, that court issued a decision, with one of the three judges on the panel dissenting, vacating the ICC's decisions because the court found "that ICC made no semblance of a showing that the exemption [from the crew selection provisions] was necessary, as required by the exemption authority section [*i.e.*, 49 U.S.C. § 11341(a)] . . . ." Appendix to ICC Petition at 3a. As the majority stated:

> Congress has given ICC broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component. The statute thus requires that the exemption authority operate according to necessity, not according to whim or caprice.
>
> This statutory limit on the Commission's authority creates certain responsibilities for ICC. In exercising its waiver authority ICC must do more than

> shake a wand to make a law go away. It must supply a reasoned basis for that exercise of its statutory authority.

Id. at 16a (footnote omitted).

Applying that principle to the case before it, the court observed that "the Commission did not give a shred of reasoning to support its view that completion of the [trackage rights] transactions required shielding crew selection from the Railway Labor Act." Appendix to ICC Petition at 19a (footnote omitted). Consequently, the majority concluded, the ICC "exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection" and it, thus, vacated the ICC's decisions on the petition for clarification and the petitions for reconsideration. *Id.* at 20a-21a.

On July 12, 1985, after the ICC asked the court to reconsider its decision (including that portion of the decision vacating but not remanding), the court *sua sponte* amended its decision to provide that the case was to be remanded to the Commission for proceedings consistent with its opinion. Appendix to ICC Petition at 45a. The court also added in its *sua sponte* order that (*Id.*):

> The Commission is not empowered [on remand] to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the procompetitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

When this case was before the ICC on the petitions for reconsideration and when it was before the court of appeals, petitioner UTU asserted that the immunity provisions of 49 U.S.C. § 11341(a) must be read in light of 49 U.S.C. § 11347.

That section of the Act expressly requires the Commission to condition any approval of trackage rights or other financial transactions under 49 U.S.C. § 11343 by directing the railroads involved "to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45." 49 U.S.C. § 11347. Petitioner asserted that since the "terms established under" 45 U.S.C. § 565 include Article 1, Section 2 of the standard protections (see page 5, *supra*),[2] no financial transaction made subject to those conditions may be used to abrogate employee rights under either the Railway Labor Act or their collective bargaining agreements. *E.g.*, J.A. at 79-80.

Petitioner UTU's arguments were rejected by the ICC which concluded that the minimum levels of protection mandated by Section 11347 "do not require preserving rights under the RLA [Railway Labor Act]." Appendix to ICC Petition at 59a. According to the Commission *Id.* at 59a-60a (emphasis added):

> . . . [S]tandard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. *To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction.* The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

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[2] Article 1, Section 2 of the employee protective provisions implements the commands of 45 U.S.C. § 565(b) that the arrangement include "such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits . . . to such employees under existing collective-bargaining agreements or otherwise; [and] (2) the continuation of collective-bargaining rights . . . ."

On its review of the ICC's decisions, the court of appeals noted petitioner UTU's argument, but did not address the issue because it initially vacated the ICC's decisions "in their entirety" without a remand. *See,* Appendix to ICC Petition at 21a n.9. As the court stated (*Id.* at 20a-21a)(footnote omitted):

> In view of this disposition, it is unnecessary to reach the second statutory issue—whether ICC may ever waive the labor protection condition section (§ 11347) through the exercise of the exemption authority (§ 11341(a)). That issue turns on whether Section 11347 is viewed as a "law" that may be appropriately waived, or as a specific qualification on the exemption authority itself. We note only that the Commission has completely failed to show any conflict between these two sections of the Interstate Commerce Act, which we assume were meant to be read in concert rather than in conflict, and we need not comment on the unlikely event that the two sections may pose a genuine conflict in some later case.

Petitioner UTU respectfully submits that a resolution of this issue would make a hearing on remand unnecessary, and, thus, petitioner requests that this Court review the issue of whether Section 11341(a) can be viewed as relieving a rail carrier of its obligations under either the Railway Labor Act or its collective bargaining agreements.

REASONS FOR GRANTING THE WRIT

I. This Cross-Petition Raises Issues Which The ICC, Our Nation's Railroads And Rail Labor Recognize Are Important To The Entire Industry And Need To Be Resolved By This Court

When the petitions by the ICC and MKT are stripped of their rhetoric, it becomes apparent that those parties, like petitioner UTU, are asking this Court to resolve a conflict which the ICC and the railroads have created between the Interstate Commerce Act and the Railway Labor Act. Petitioner UTU respectfully submits that when the Interstate Commerce Act is

viewed objectively and in light of its history, there is no conflict between the two Acts. But, as shown by the ICC's response to the court of appeals decision in this case,[3] the ICC believes that there is a conflict and that it is the ICC's order, and not the Railway Labor Act or collective bargaining agreements, which "is to govern employee-management relations in connection with the approved transaction." *Maine Central R.R.—Exemption, supra,* ICC Petition at 50a. Petitioner UTU respectfully submits that the questions of whether there is a conflict and, if so, what is the proper resolution of that conflict, are extremely important issues to the orderly administration of both the Interstate Commerce Act and the Railway Labor Act. These precise issues have not been resolved by this Court, but because of their importance, should be resolved by this Court. Rule 17.1(c), Rules of this Court.

Railroads have been subject to economic regulation under the Interstate Commerce Act for almost 100 years, and during that time period, Congress gradually increased this regulation so that by 1979 railroad rates, securities and entry-exit decisions were regulated by the Act and by the ICC. That degree of regulation, however, changed in 1980 with the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, for by that law Congress declared that "modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential in order to achieve maximum utilization of railroads to save energy and combat inflation." Pub. L. No. 96-448, § 2(9), 94 Stat. 1896-97.

Nevertheless, railroads are still regulated and this regulation requires that a rail carrier obtain ICC approval before it merges, unifies or grants trackage rights to another carrier. 49 U.S.C. § 11343(a). Before it can authorize such financial transactions, the ICC must find that the proposed transaction is "consistent with the public interest" (49 U.S.C. § 11344(c))

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[3] *Maine Central R.R.—Exemption,* ICC Finance Docket No. 30532, served September 13, 1985 (unpublished), *pet. for review pending,* D.C.Cir. No. 85-1636. That decision has been reproduced as an addendum to the ICC's Petition to this Court.

which cannot be determined until the Commission has considered "the interest of carrier employees affected by the transaction." 49 U.S.C. 11344(b)(1)(D). Finally, no rail merger, unification or grant of trackage rights can be authorized unless the Commission requires the carriers involved to provide a fair arrangement to protect the interests of employees who may be affected by the financial transaction. 49 U.S.C. § 11347.

Prior to the passage of the Staggers Rail Act, the ICC had been presented with assertions by carriers that a Commission control or unification order, by virtue of Section 11341(a)'s predecessor, superseded collective bargaining rights and agreements; those assertions were rejected by the Commission. *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151, 168-70 (1967); *accord, Chicago, St. Paul, Minneapolis & Omaha Ry. Lease*, 295 I.C.C. 696, 702 (1958). In the *Southern-Central* case the ICC stated as follows (331 I.C.C. at 170):

> By its terms, section 5(11) [now, 49 U.S.C. 11341(a)] applies only to antitrust and other restraints of law from carrying "into effect the transaction so approved...." Neither the Washington Agreement [*i.e.*, an employee protective agreement negotiated in 1936] nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed section 5 transactions have been successfully consummated in full compliance with such terms.... The essential problem to be resolved is an accommodation of laws, a role not foreign to us in section 5 transactions.... When balancing the national policy as to transportation with that of labor relations, we "act in a most delicate area... [and] policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other." *Burlington Truck Lines* [*Inc. v. United States*, 371 U.S. 156, 172-73 (1962)]....
>
> The designated "exclusive and plenary power" of the Commission in section 5(11) cannot be so broadly construed as to brush aside all laws—be they

> statutorily created antitrust laws or voluntary contractual agreements made binding by the force of law. . . .

Southern-Central's reasoning does not stand alone, for in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), the Fifth Circuit concluded that Section 11341(a)'s predecessor (Section 5(11)) and the Act's unification provisions (now, 49 U.S.C. § 11343, *et seq.*) should not be read as allowing carriers to bind rail labor to new working conditions through the device of including those new, unilaterally devised terms in their applications to the Commission for approval of Section 11343 transactions. 307 F.2d at 158-60.

Shortly after the Staggers Rail Act was enacted, rail carriers began to assert that the ICC had exclusive jurisdiction over labor related issues which may arise out of rail mergers and that the employee protective provisions imposed by the ICC were the exclusive means to resolve such disputes, including, in particular, disputes over whether existing agreements should be modified or abrogated.[4] Until 1983, that assertion was rejected by virtually every arbitrator appointed under Article 1, Section 4 of the employee protective provisions to whom that argument was made. *See*, Brief for UTU to court of appeals at Appendices C and D. However, the Commission's October 1983 decision denying the petition for reconsideration in this case has been relied upon by the carriers to renew their attack on existing collective bargaining agreements, and now arbitrators under Article 1, Section 4 of the employee protective conditions, have reversed themselves and have concluded that they have the authority to modify existing agreements. *E.g., In re: Norfolk & Western Ry. and UTU*, Arbitration under ICC Finance Docket No. 30582, decided September 25, 1985 (R.J. Ables, Neutral). Those new decisions are based upon the ICC's belief as stated in the case at bar that: "To the extent that

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[4] This argument was based in part upon the decision by the Eighth Circuit in *BLE v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction." Appendix to ICC Petition at 60a.

The question of the validity of the ICC's belief as to the effect of its orders on employees rights is extremely important and, unless this issue is resolved by this Court, the current uncertainty over this issue will surely lead to massive and possibly disruptive disputes in the railroad industry. Since the ICC's October 1983 decision, rail carriers have insisted that they can use the ICC's regulatory process to ignore or modify existing collective bargaining agreements. Several railroads were successful in making this assertion in the *Ables'* award cited above, and as a result obtained an award abrogating the existing agreement for UTU-represented employees on the Interstate Railroad and placing those employees under the UTU agreements on the Norfolk & Western Railway, even though those employees had unanimously rejected such a forced change in employment terms. *See*, Complaint in *UTU v. Norfolk & Western Ry.*, D.D.C. Civil Action No. 85-3410, dismissed for lack of subject matter jurisdiction, November 29, 1985. Also, in the massive merger case presently pending before the ICC, *Santa Fe Southern Pacific Corp.—Control*, ICC Finance Docket No. 30400, the carriers have asked the ICC:

> [E]xpressly to find that it is necessary in the public interest for SPSF [the merged carrier] to implement the contemplated consolidations and operational changes notwithstanding existing collective bargaining agreements or the requirements of the Railway Labor Act.

F.D. No. 30400, Verified Statement of J. P. Frestel, Jr. and K. R. Peifer at 23 (SFSP-50).

This case presents an excellent vehicle to resolve the issue of whether there is in fact a conflict between the Interstate Commerce Act and the Railway Labor Act, for that issue was presented to both the ICC and to the court of appeals and was decided by the Commission on purely legal terms. While this

issue is now being raised in other cases, it will be harmful to both rail labor and to the railroads to delay its resolution because the question is being presented repeatedly in situations where injunctive relief is essential; such situations do not give the courts sufficient time to analyze this complex question and present conflicting claims by both rail labor and the railroads of substantial harm where, in reality, the public suffers whenever relief is not granted.[5]

Petitioner UTU has been informed that the BLE will also be asking this Court to accept this case for review, and counsel has been authorized to state that the Railway Labor Executives' Association [hereinafter, "RLEA"][6] supports the cross-petition by the UTU. Petitioner UTU has consented to a request by the Association of American Railroads to file a brief as an *Amicus Curiae* supporting the petitions by the ICC and MKT. Consequently, this case presents the unique circumstance where the agency charged with regulating the economic affairs of railroads, the rail industry itself and rail labor are all urging this Court to resolve an issue which they all recognize is important and needs to be addressed by this Court.

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[5] In its petition, the ICC cited several cases which it asserts present the issue which it has raised in its petition *i.e.*, whether it must explain which laws are being superseded by 49. U.S.C. § 11341(a). ICC Petition at 17 n.13. Except for the *Boston & Maine* case, none of the cases cited present the issue as framed by the ICC, for the other three cases do not deal with Section 11341(a). Rather, those cases all present the underlying question of whether there is in fact a conflict between the Interstate Commerce Act (and in the *Milwaukee* case, the Bankruptcy Act, 11 U.S.C. § 205 (repealed)) and the Railway Labor Act.

[6] RLEA is a voluntary, unincorporated association of the Chief Executive Officers of nineteen (19) labor organizations which collectively represent virtually all organized railroad employees in this Country. A list of RLEA's member organizations is attached hereto as Appendix B.

II. By Concluding That There Is A Conflict Between The Interstate Commerce Act And The Railway Labor Act, Respondent ICC Has Decided An Important Question In A Manner Which Conflicts With Applicable Decisions Of This Court

When the Commission addressed petitioner UTU's argument that it lacked the power to relieve a rail carrier of its contractual and Railway Labor Act obligations, respondent ICC took a purely parochial approach and asserted that whatever contractual or statutory rights employees may have must give way to its order approving a transaction under 49 U.S.C. § 11343(a). Appendix to ICC Petition at 60a, 67a. That narrow approach to this problem is contrary to prior decisions of this Court, the Fifth Circuit, and the ICC itself. Because of the importance of this issue, Petitioner UTU respectively submits that it should be resolved by this Court

Although the ICC has recognized since the 1930's that the interests of employees was an essential element of the public interest, *St. Paul Bridge & Terminal Ry.—Control,* 199 I.C.C. 588, 596 (1934), it has been specifically charged by statute since the passage of the Transportation Act of 1940, 54 Stat. 898, to consider those interests whenever it passed upon a request by railroads under what is now 49 U.S.C. § 11343(a) for authority to merge or to grant trackage rights. Moreover, since 1940, the ICC has been required to impose a fair arrangement to protect railroad employees whenever it approved such a merger or trackage rights transaction. Consequently, the relationship between the ICC's merger authority and the Railway Labor Act should not be a novel question.

Indeed, as shown in Argument I, *supra,* the ICC has addressed this issue before at length in the *Southern-Central* case; in that case the Commission concluded that its order and its protective provisions did not abrogate existing Railway Labor Act rights. As the ICC stated in its *Southern-Central* decision (331 I.C.C. at 169-70)(emphasis in original):

> Rights obtained by employees under section 5(2)(f) [now, 49 U.S.C. § 11347] are the minimum protection which an applicant carrier must provide in order

> to obtain this Commission's approval of its transaction. They are not, however, the maximum rights employees may gain [illegible]e rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carriers under section 5(2)(f) are independent, separate and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees. The existence of multiple sources of employee protection does not imply, however, that any employee necessarily has a right to duplicative benefits from all sources. These protective conditions imposed upon carriers under section 5(2)(f) which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their adjustments of the labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect. . . .

This conclusion that the ICC merger order does not abrogate existing collective bargaining agreements, is also consistent with the Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra.* In that case, the court of appeals expressly rejected the carriers' argument that they had the right to bind rail labor to changes in working conditions by including those modifications in their applications for approval of transactions under what is now Section 11343 of the Interstate Commerce Act. The court concluded that the merger provisions of the Act could not be read as "giv[ing] the carriers the right to legislate the terms of

a continuing contract with a third party, although a different contract more favorable to the third party might have been equally acceptable to the Commission." 307 F.2d at 158.

In this case, however, the ICC ignored both its reasoning in the *Southern-Central* case and the holding of the Fifth Circuit in the *Texas & New Orleans* case to conclude that its order approving a financial transaction under Section 11343 automatically relieves a railroad of any law or contract which may prohibit that railroad from implementing the transaction as proposed in the operating plan submitted with its request for approval of the underlying financial transaction. In other words, the Commission has ruled in this case that if rail carriers include with their request for ICC approval of a financial transaction, a proposal to accomplish changes in operations resulting from that financial transaction in a way that violates both collective bargaining agreements and the Railway Labor Act, the self-executing provisions of 49 U.S.C. § 11341(a) automatically relieve the carriers of inconsistent Railway Labor Act and contractual obligations once the underlying financial transaction is approved, even though the financial transaction could have been accomplished by other means that would not have abrogated either contractual or Railway Labor Act rights of employees.

Petitioner UTU respectfully submits that such a far reaching and one-sided interpretation of the ICC's powers under Sections 11341(a) and 11343 of the Interstate Commerce Act should be reviewed by this Court, because the Commission's decision lacks any showing that the agency complied with applicable decisions by this Court. First, the decision reveals that the agency completely ignored this Court's repeated admonition to federal courts and administrative agencies that, when confronted with two Acts of Congress which appear to apply to the same subject, the duty of the court or agency is to "read the statutes to give effect to each if . . . [it] can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). And second, this Court has previously cautioned the ICC that the Interstate Commerce Act is not the only form of interstate commerce regulation with which Congress is concerned, for carriers are also regulated by labor

relations statutes; as this Court stated in *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 172-73 (1962):

> The Commission acts in a most delicate area here [*i.e.,* a proceeding licensing a replacement motor carrier during a strike], because whatever it does affirmatively . . . may have important consequences upon the collective bargaining processes between the union and the employer. The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other.

Here, the ICC did not make any attempt to accommodate the policies of the two Acts, nor did it attempt to read the two Acts so as to give effect to each, thereby avoiding a conflict. Indeed, in light of both the command of 49 U.S.C. § 11347 that collective bargaining rights and agreements be preserved (*see,* 45 U.S.C. § 565(b)(1) and (2)), and the fact that for more than forty (40) years under the merger provisions of the Interstate Commerce Act there was no conflict between the two Acts, the Commission's failure to comply with the directions of this Court is indefensible.

Unfortunately, as shown by the *Maine Central* decision, *supra,* note 3, the decision by the court of appeals in this case has not led the ICC to correct the errors in its approach to its powers. Rather, respondent ICC persists in maintaining, without the analysis required by *Watt* or *Burlington,* that the Railway Labor Act and employee contracts must give way to its exclusive and plenary powers under the Interstate Commerce Act.[7] *Id.,* ICC Petition at 49a-50a. In view of the deference which courts give to administrative agencies' interpretations of their governing statutes, *e.g., Chevron U.S.A. v. Natural Resources Defense Council, Inc.,* ____ U.S. ____, 104 S.Ct. 2778 (1984), it is important to rail labor and to the rail industry that this Court resolve the questions of whether there is in fact a conflict between the two Acts and, if so, what are the standards which should be applied to determine which Act survives.

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[7] The depth of the ICC's feeling may be seen from the fact that the *Maine Central* case involved an exemption from regulation under 49 U.S.C. § 10505. Consequently, the immunity provisions of 49 U.S.C. § 11341(a) are not even applicable. *See, Anheuser-Busch Companies—Control,* ICC Finance Docket No. 30096, served June 6, 1983, slip op. at 5 (unpublished) (Chairman Taylor, dissenting in part).

CONCLUSION

For the reasons set forth herein, petitioner UTU respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision by the ICC that it has the power to relieve a rail carrier of contractual and Railway Labor Act obligations to its employees.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

1. Section 11341(a) of Interstate Commerce Act, 49 U.S.C. § 11341(a), as amended.

The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by *or exempted by* the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that *approved or exempted* transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entited to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

2. Section 11347 of Interstate Commerce Act, 49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the

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* § 21(a) of Pub. L. No. 97-261, 96 Stat., 1122 (1982), amended this subsection by inserting the underscored portions; that amendment was effective 60 days after the date of its enactment on Septmeber 20, 1982.

transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

APPENDIX B

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors Association (Division of BRAC);
American Train Dispatchers Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Brotherhood of Railway & Airline Clerks;
Brotherhood Railway Carmen of the U.S. and Canada;
Hotel & Restaurant Employes & Bartenders International;
International Association of Machinists and Aerospace Workers;
International Brotherhood of Boilermakers and Blacksmiths;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen and Oilers;
International Longshoremen's Association;
National Marine Engineers' Beneficial Association;
Railroad Yardmasters of America;
Searfarers International Union of North America;
Sheet Metal Workers International Association;
Transport Workers Union of America; and
United Transportation Union.